IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

Atterol, Inc., a Delaware Corporation, Lee Smutz and Eileen Smutz, his Wife,	:	C.A. No. 02-01-053
Plaintiffs,	:	
vs.	:	
John D. Wingart and Rhonda L. Wingart,	:	
Defendants.	:	

Decision after trial

Date of Trial: May 11, 2005

Date Decided: May 23, 2005

Judgment for defendants.

Andre M. Beauregard, Esquire, Brown, Shields, Beauregard & Chasanov, Post Office Drawer B, Rehoboth Beach, Delaware 19971, Attorney for Plaintiffs.

James D. Griffin, Esquire, Griffin & Hackett, P.A., Post Office Box 612, Georgetown, Delaware 19947, Attorney for Defendants.

Trader J.

In this civil action for the return of a deposit for the purchase of real estate and the sale of a restaurant, I hold that Atterol, the defaulting buyer, may not recover the amount of its deposit from the sellers, John D. Wingart and Rhonda L. Wingart (Wingart) because Wingart may retain the deposit as liquidated damages under the contract. Since Lee Smutz and Eileen Smutz are not parties to the contract, the motion to dismiss is granted as to those plaintiffs.

The Facts

On September 24, 2001, Atterol entered into a contract of sale with Wingart for the purchase of Magnolia's Restaurant property and business located on Cedar Neck Road, Ocean View, Delaware. The purchase price was $2,250,000.00 and Atterol made a deposit of $25,000.00 upon the signing of the contract. The contract provided that the buyer would make written application for financing within ten days. The contract further provided if the buyer does not obtain financing in the amount of $1,400,000.00, the deposit money may be returned to Atterol. If the financing was denied, the buyers were obligated to furnish a denial letter to the sellers. The contract also provided that should the buyer furnish incomplete information to the sellers or fail to cooperate in the process of the mortgage loan application, or fail to perform any condition of the contract, the sellers may retain the deposit as liquidated damages. An addendum to the contract provided that the buyer will obtain prequalified approval from the lender and present it to the seller within ten days of the execution of the contract.

Atterol submitted its application for financing within two or three days after the signing of the contract and the application requested a loan of $1,800,000.00. The real

estate of Magnolia's Restaurant and Pub was appraised at $1,500,000.00. This appraisal included an evaluation of the net income of the apartments and restaurant.

On November 19, 2001, Lee Smutz was notified that Atterol's request for a loan was denied. He immediately called Wingart for a return of the deposit and Wingart refused to return the deposit. As a consequence of Wingart's refusal to return the deposit, this civil action was initiated in the Court of Common Pleas of Sussex County. The defendants have filed an answer and counterclaim and assert they may retain the deposit as liquidated damages.

Atterol's Contention that the Contract was Incomplete is without Merit

Atterol contends that there was a page missing from the contract that it signed. The contract that Atterol introduced into evidence, (Plaintiff's Exhibit 1) did not contain page 3 of the contract. Page 3 (Plaintiff's Exhibit 2) contains the provision on liquidated damages and default provisions. I am not persuaded that page 3 was missing from the contract that Atterol signed and I find page 3 was a part of the contract that the buyers signed.

Atterol's theory of recovery set forth in its pleadings is that it is entitled to recovery of the deposit because it fully complied with the contract. Neither the complaint nor the pretrial stipulation alleges a theory based on a different contract and this legal theory is asserted for the first time at trial.

Lee Smutz testified that the contract was prepared in his presence and was complete when he signed it. He testified that he did not read the contract. Eileen Smutz testified that it was an emotional time and she did not read the contract. It is not credible that such important provisions relating to default of the parties, proration of taxes, and

conveyance of a good and marketable title would not be included in the contract. Atterol has not maintained its burden of proof in establishing that paragraphs 11 through 17 were missing from the contract that it signed.

The Buyer's Breach of Contract

Wingart contends that since Atterol breached the contract that they may retain the deposit as liquidated damages. I agree. Although Atterol claims that it applied for financing within 10 days, it did not introduce into evidence its loan application to the Wilmington Trust Company. Furthermore, the loan officer was scheduled to be called as plaintiff's witness and his failure to appear raises an inference that his testimony would have been be adverse to plaintiff. Additionally, Atterol did not present a prequalified approval to Wingart within ten days as provided in the addendum to the contract.

Wingart also contends that Atterol breached the contract by the failure to produce a denial letter and the failure to seek financing in the amount of $1,400,000.00. Atterol did not produce a denial letter to Wingart until one week prior to this trial.

The failure of the buyer to seek financing in the amount of $1,400,000.00 is a material breach of contract because the bank may have granted a loan in that amount. By seeking a loan in the amount of $1,800,000.00, the buyer guaranteed that the loan would be denied. Atterol's failure to seek a loan in the amount of $1,400,000 violates the covenant of fair dealing which is implicit in every contract.

The Liquidate Damages Provision

Paragraph 11 of the contract of sale provides that the sellers may retain the buyer's deposit as liquidated damages in the event of buyer's default or breach of contract. Parties to a contact may agree to the damages that are to be paid as

compensation for a breach. Such stipulated sum is enforceable if not a penalty. 22 Am. Jur. 2d *Damages* Sec. 494 (2004).

Liquidated damages are the parties' "best guess" of the injury that would occur in the event of a breach. *S.H. Deliveries v. Tristate Courier & Carriage*, 1997 WL 817883 (Del. Super.). A penalty is "a sum inserted into a contract that serves as a punishment for default, rather than a measure of compensation for its breach." *Id.* at *2. It has been held that a term of a contract providing for payments which amount to a penalty is unenforceable on the grounds of public policy. *Piccotti's Restaurant v. Gracie's*, 1988 WL 15338 (Del. Super.). If the liquidated damages clause is valid, it will be enforced according to its terms. *S.H. Deliveries, Supra.*

In *Tristate,* the court enumerated a two-part test to determine if the clause is valid. A clause for liquidated damages is valid when:

> (1) the damages for which the parties might reasonably anticipate are difficult to ascertain (at the time of contracting) because of their indefiniteness or uncertainty, and (2) the amount stipulated is either a reasonable estimate of the damages which would probably be caused by the breach or is reasonably proportionate to the damages which have actually been caused by the breach.

If the damages are easily ascertainable or the amount fixed is excessive, the provision is void. *Wilmington Housing Authority v. Pan Builders*, 665 F.Supp. 351, 354 (D. Del.1987). Additionally, it matters not whether actual damages are proven or that the liquidated damages are substantially larger than the actual damages, so long as liquidated damages were a reasonable estimate of the damages which would be caused. *Piccotti's Restaurant, Supra*.

The Law on Liquidated Damages Related to the Case Before Me

In analyzing the contentions of the parties, there is a presumption in favor of the validity of the liquidated damage provision. *Tristate, Supra.* Therefore, it is up to the party opposing the liquidated damages clause to demonstrate that it is invalid and unenforceable. The prevailing view is that whether a stipulated sum is for liquidated damages or penalty is a question of the law for the Court's resolution. 22 Am. Jur. 2d *Damages* Sec. 499 (2004).

In the case before me, the amount of damages would be difficult to ascertain. Because of the existing contract of sale, Wingart did not refinance their loan at a lower rate. After the breach of contract, Wingart refinanced their loan on January 1, 2002 at a lower rate and they were required to pay an origination fee of $10,000.00. The exact amount of damages that Wingart suffered because of the drop in interest rates is not easily ascertainable. Additionally, it is difficult to determine the compensation that should be awarded to the sellers for the time they spent working with the buyer and appraiser in contemplation of the sale of the restaurant. Therefore, I hold that the damages at the time of the inception of the contract were uncertain.

Secondly, the amount of the deposit is not excessive. The amount constituted only 1.11% of the total contract price. The amount fixed for liquidated damages is a reasonable estimate of the damages that would be caused by a breach of contract. Therefore, the liquidated damage provision in the contract is valid and must be enforced.

Since I conclude that the liquidated damage clause is valid and Atterol has breached the contract of sale, it cannot prevail on its claim and the sellers may retain the deposit as liquidated damages.

Paragraph 12 of the contract states that in the event of a dispute under the contract, the unsuccessful party is liable for the other parties' attorney's fees. Therefore, Wingart is entitled to reasonable attorney's fees.

In accordance with these findings of fact and conclusions of law, judgment entered on behalf of John D. Wingart and Rhonda L. Wingart and against Atterol, Inc., a Delaware corporation for costs of these proceedings plus reasonable attorney's fees.

IT IS SO ORDERED.

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Merrill C. Trader
Judge